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# SUPREME COURT OF THE UNITED STATES.

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OCTOBER TERM, 1902.

THE DEFIANCE WATER COMPANY,
*Appellant,*

*vs.*

THE CITY OF DEFIANCE ET AL.,
*Appellees.*

*No. 252.* 21

## BRIEF FOR APPELLANT.

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ROBERT NEWBEGIN,
Solicitors for Appellant.

ROBERT W. BINGHAM,
Of Counsel.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

**No. 257.**

THE DEFIANCE WATER COMPANY,
Appellant,

*vs.*

THE CITY OF DEFIANCE AND THE COUNCIL OF THE CITY OF DEFIANCE,
Appellees.

Brief for Appellant.

## STATEMENT OF THE CASE.

This is a suit in equity brought in the Circuit Court of the United States for the Northern District of Ohio, Western Division, by the appellant, by its bill filed therein on the 24th day of June, A. D. 1898. The object and prayer of the bill was to prohibit the appellees, the defendants below, from repudiating and abrogating a certain contract entered into by the defendants with the complainant's assignors, Samuel R. Bullock & Company, on the 17th day of August, A. D. 1887, by ordinance of the city of that date, for renting certain hydrants of the Water Company for fire protection and other purposes.

It is alleged in the bill and amendment thereto, that the Defiance Water Company, a corporation of Ohio, was organized for the purpose of operating water works in the said city of Defiance; that on said 17th day of August, an ordinance was passed by the city council, entitled:

"An ordinance to authorize and provide for the construction and maintenance of a system of water works in the city of Defiance, Defiance county, Ohio."

A copy of the ordinance was annexed to the bill as exhibit "A" (see printed record, pp. 11–18).

That thereby the right and privilege was granted for thirty years thereafter, to Samuel R. Bullock & Company, their successors and assigns, of locating and operating a system of water works in said city and in consideration of the public benefit to be derived therefrom, of using the streets of the city for the purpose of placing their pipes, conduits and hydrants therein. (Sec. 1.)

That by said ordinance the city rented of Samuel R. Bullock & Company, their successors and assigns, 130 water hydrants at $40 per annum, payable semi-annually on the first days of January and July of each year, and such other hydrants as it wished, to be constructed by said Bullock & Co. or its assigns on demand of the city, at the rate of $30 each, per annum, for the unexpired portion of said thirty years, payable as aforesaid. The water through said hydrants was to be used for extinguishing fires, fire practice, sanitary purposes, washing out of gutters, etc., under control of the city council and the superintendent of the water works. (Sec. 3.) The Water Company was to furnish free, water for the schools of the city, the cemetery, public buildings then erected or thereafter erected during the term and for public fountains. (Sec. 4.) Bullock & Company were to organize a corporation under the laws of Ohio, and were authorized to assign to it all their rights under the ordinance. (Sec. 5.)

That Bullock & Co. or assigns should submit the water works to a certain test on the performance of which the city agreed formally to accept the works (Sec. 6); that they (Bullock & Co. and assigns) were required to and did file a written acceptance of said ordinance, and give bond in the sum of $5,000 for their compliance with the terms of said contract and ordinance. (Sec. 7.)

The ordinance provided that Bullock & Co. and assigns should make extensions of their water mains whenever required by the city council. (Sec. 10.)

That it was further provided in said contract that the said city, at the expiration of ten years after the ordinance took effect, and at the expiration of any five years thereafter, should have the right to purchase the waterworks, upon certain terms named. (Sec. 9.)

It is then alleged in substance in the bill (Record, pp. 5 and 6) and in the amendment thereto (Record, pp. 25 and 26, to be inserted in the bill at end of first paragraph, p 6), that during the fall or winter of 1887, Bullock & Co. became largely involved in indebtedness, for material furnished and moneys loaned for the construction of said water works, in the sum total of about $150,000, and that their creditors were about to levy attachments on the works and material, so that said Bullock & Co. were unable to complete the said water works and comply with their contract with the city; when by the agreement of all the parties in interest, with the consent and knowledge of the said city, said Bullock & Co. assigned and transferred to the Defiance Water Company (the complainant), a corporation that had been organized for the purpose, all their right and interest in and to the said water works and property and contract with the said city, said creditors taking each an amount of stock in the corporation in proportionate to the several amounts due them from Bullock & Co. That said creditors took the assignment of the interest of said Bullock & Co. in the said property and water works and in the said contract with the city at the special instance and request of the said city, made by its council; and the said city council specially requested the said creditors to complete the construction of said water works.

That relying on the representations of the said city, made through its council, and the promise and agreement of the city to pay for the water furnished it, "said Defiance Water Company went on and completed the construction of the said water works in accordance with the terms of said ordinance and said contract with the said city of Defiance, to the entire satisfaction of said city and its council, so that the said water works stood and performed the test above set forth and required by the said city council; and the same were, by resolution of the said city council, passed on the 5th day of March, A. D. 1889, accepted." (Rec. p. 6. A copy of the resolution of acceptance is attached to the bill as Ex. B., Rec. p. 18.)

It is alleged in the bill that the actual cost of the construction of the water works and the extension of the mains and hydrants was $196,000, for which the bonds of the company secured by mortgage on all of its property, were issued, and taken by said creditors in discharge of their claims; that said creditors completed the construction of said water works and took said bonds in satisfaction of their

claims in full faith that the city would comply with its contract for the use of water and they relied on the revenue to be derived from the rental of the hydrants to the city for any remuneration for their money so invested, and that the water company has no other means of paying any part of the interest on said bonds than the rental of said hydrants to the city; that the total revenue of the water company from all other sources is insufficient to meet the expenses of the operation of the works and that the net annual revenue from the operation of the works, including the annual rentals of the hydrants to the city under the contract is insufficient to pay more than two and one-half per cent interest on the bonds.

It is further alleged that from time to time down to July 1, 1895, on order of the city, the complainant had extended its mains and constructed additional hydrants, to the number of thirty-one, which had been used since that time by the city at an annual rental of $35 each. (And see amendment to bill, record page 26.) That from the time of the construction of said water works and hydrants to the present the city has used the same, under its contract, and the complainant has furnished water by means of the same to the city for the purposes named in the contract, and is still so furnishing all the water required by the terms of the contract and the city has paid semi-annually the rents accruing therefor down to July 1, 1897, and that from the time of the completion of said water works and the construction of said hydrants the city has had the entire control and possession of the said 161 hydrants, has made use of them as the sole means of extinguishing fires, is still using the same and still has entire possession and control of them. That the complainant, as the assignee of said Bullock & Co., has fully complied with all the conditions of said ordinance and contract on its part; that on January 1, 1898, there was due and owing from the city of Defiance to the complainant for water rent for said hydrants for the last half of the year 1897, the sum of $3,142.50 and (amd. to bill, record, p. 26) there would become due and payable, at the end of each six months thereafter during the term of said contract, the like sum of $3,142.50.

It is alleged in the bill and amendments, that notwithstanding the foregoing the city council of Defiance on January 7, 1896, without any prior or subsequent notice thereof given to the complainant, passed an ordinance or resolu-

tion rescinding and annulling the said contract of the city with the complainant; this resolution is as follows:

"Whereas the Defiance Water Company have submitted a bill to the city council for $3,160 alleged to be due them from the said city for water rental for the past six months:

And whereas, said council are of the opinion that no water contract exists or is between said city and said company for the payment of the same; and furthermore that said bill is, in view of the deplorable inefficiency of the alleged water service, wholly without merit in reason and equity:

And whereas, the best interest of the city in their opinion demands that the present service be discontinued, and immediate steps be taken for the purpose of supplying water to the said city upon fair and equitable terms.

Therefore be it resolved, that the city clerk is hereby directed forthwith to draw his warrant on the city treasurer against the water fund of said city for the sum of $3,160 in favor of said Defiance Water Company in full payment of said bill; provided, however, that if said warrant be accepted by said company, it be taken and accepted by them without in any manner being construed or taken to be any acknowledgment of any contract between them and the said city for said water rentals, or in any manner implying any actual performance of any alleged contract and that no further payments at the present rate be made to the said company." (See exhibit A to plea, Rec. pp. 48 & 49.)

It is further alleged, that the said city council and its several members, ever since the passage of the resolution of January 7, 1896, repeatedly stated and gave out to the public that the city had no contract as aforesaid with the water company, and that they passed resolutions and ordinances looking toward the construction of water works by the said city for furnishing water to it and its citizens, and to supercede the complainants service, notwithstanding that the city had not given any notice to the complainant and had never offered to purchase the complainant's water works, as provided by the said contract; and by that means and the general denial that the complainant had a contract the defendants induced many of the consumers of water to abandon its use and thereby largely depreciated and were depreciating the value of the complainant's property. (See Rec. p. 8 and amendment, bottom of p. 26, and exhibits B and C to defendants' plea, pp. 49 and 50.)

It is further alleged in the bill (Rec. p. 8), that the said city council requested the city solicitor of said city and combined, colluded, and confederated with him to bring suit in the Court of Common Pleas of Defiance County, in the name of the said city against the said city council, (see Rec., p. 147) and that suit was therein brought by the said solicitor in the name of the city through and by the procurement of the said council, to have themselves enjoined from paying the complainant the said sum of $3,142.50 due January 1, 1898, for hydrant rentals for the last half of the year 1897; that the object and prayer of the petition in said suit was to perpetually enjoin the said council from paying any water-rents that had accrued to the complainant in the past, especially said $3,142.50, as well as for water to be furnished the city in the future under said contract. The petition in this suit was filed in the said Court of Common Pleas on the 4th day of January, 1898, and on the same day a temporary injunction, as prayed for in the petition, was allowed by the Probate judge, (the judge of the Court of Common Pleas being absent from the county) and served. The complainant was named as a defendant in the suit, though no relief whatever was asked against it, (the full substance of the petition and the prayer and copy of the order of injunction allowed appear in the bill, Rec. pp. 2 and 3.)

It is further alleged in the bill that application was made to the council to assist in the defense of the suit, and that they refused; that having enjoyed all the benefits of the contract, and having stood by and seen the complainant expend large sums of money in the construction of its water works the city is now estopped from denying the existence of the contract, and from refusing to pay for the use of water under it; that the effect of the said injunction, if it stood and was made perpetual, would be to deprive the complainant of its property without due process of law, and that the passage of the said ordinances and resolutions by the city council were an abrogation of the contract, and that they are laws impairing the obligation of the said contract, contrary to the provisions of the Constitution of the United States. The prayer of the bill is that the defendants may be enjoined from denying the existence of the said contract and from attempting to abrogate or annul it, and that an account may be taken of the water rents due the complainants and for the use of its hydrants in the past and pending suits.

(See bill and exhibits, record pp. 1–20, and amendments, pp. 25–27.)

To this bill and amendments the defendants filed separate demurrers, which were overruled by the court (Judge Severens sitting), on the 30th of December, 1898, the court retaining jurisdiction of the suit and holding that the said contract "was valid for twenty years from its date." (See Rec., pp. 29–32, and 90 Fed. Rep. 753.)

On the 16th day of January, 1899, the Court of Common Pleas of Defiance County decided the said suit of the City of Defiance, by its solicitor, vs. The Council and the Water Co. against the city and rendered final judgment therein, dismissing the plaintiff's petition and by leave of the court the complainant on January 24, 1899, filed a supplemental bill in this suit setting up the final judgment of the said Court of Common Pleas, and further alleging therein that it had presented its account for accrued water rentals to date, to the city council for allowance and payment and that they refused to consider it. (See Rec., pp. 33–36.)

On February 25, 1899, the defendants filed what they designate as a "joint and several plea" and an answer in support of it. (Rec., pp. 36–55.) On argument this was held insufficient by the court. (Rec., p. 55.)

Answer was then filed by the defendants, May 1, 1899. (Rec., pp. 56–78.)

In their answer the defendants, in substance, admit, that the contract and ordinance set out in the bill (Exhibit A) was entered into and passed by the city council; but they aver it "was never submitted for ratification to a vote of the electors of the city." (Rec., pp. 56–61.)

They admit that said Bullock & Co. filed with the city clerk their written acceptance of the ordinance and gave bond for their compliance with its conditions. (Rec., p. 60.)

They admit that the suit was brought, in the Court of Common Pleas of Defiance County, by the city solicitor, to enjoin the council from paying any and all claims of the complainant for the accrued water rents, substantially as alleged in the bill. (Rec., pp. 56, 57).

They admit, in substance, that the complainant corporation was organized for the purpose of operating water works in said city and supplying the city and its citizens with water. (Rec., p. 57.)

They admit that the city council accepted the water works of the complainant, March 5, 1889. (Rec., p. 59.)

They admit that after the completion of the water works thirty additional hydrants were put in by the complainant at the request of the city; that the city paid the com-

plainant, from time to time, the full amount falling due for hydrant rentals, named in the said ordinance of 1887, down to January 1, 1898, (except the $500 not in dispute) and admit that the city used the hydrants for fire and water purposes; they do not deny that it is still using them, nor do they deny having possession and control of them, they deny only the *entire* possession. (Rec. p. 60.)

They *aver* that the construction of the water works system was by the complainant or the successors and assigns of said Bullock & Co. (Rec. p. 61.)

They admit, in substance, that the said defendants have denied the validity of the said contract. (Rec. p. 61.)

They admit that the city did not elect to purchase the complainant's water works, under the terms of the contract, and, in substance, admit the complainant's charge in the bill that they passed resolutions and ordinances looking toward the construction of the water works by the city. (Rec. p. 63 and bill p. 8.)

To the answer replication, in the usual form, was filed by the complainant. (Rec. p. 80.)

On January 9, 1900, the defendants filed in the Circuit Court a paper, called a motion, to stay further proceedings in the case until the disposition of the suit in the State courts, brought by the city solicitor to enjoin the council from paying the complainant its hydrant rentals, which suit they stated in the motion had been appealed to the Circuit Court of said Defiance County and was then pending therein. (Rec. pp. 80–84.)

This motion was overruled by the court (Judge Severens, circuit judge) March 17, 1900. (Rec. pp. 84 and 85 and 100 Fed. Rep. 178.)

Rule was then entered for the taking of testimony, to be completed by the 21st day of May, 1900. (Rec. pp. 85, 86.) Under this rule proofs were filed in support of the general issues, by both of the parties to the suit.

On May 28, 1901, application was made by the defendants to the Hon. Francis J. Wing, district judge, for leave to file a supplemental answer in the case and to plead therein the decision of the Circuit Court of Defiance County, on appeal of the injunction suit of the city against the council and the Water Company, and for leave to file a transcript of the record of the said Circuit Court in support of their application. (Rec. p. 87.) This motion in substance was allowed *on June 17, 1901*, the court ordering the paper to be filed as a "plea" instead of "supplemental

answer and amendment to original answer." The complainant excepted to this order of the court. (Rec., p. 96, motion and paper proposed to be filed, pp. 87 and 89-95 and opinion of Judge Wing, p. 88.)

On argument upon the sufficiency of this supplemental plea, the same was held by the court sufficient in law. (Rec. p. 96.)

To this supplemental plea the complainant then filed the usual replication in equity, and rule was entered to take testimony on the issue thereby formed. (Rec., p. 97.)

The case came on for final hearing at the December term of the court, December 21, 1901, when the court ruled that the case would be for hearing on the said supplemental plea filed June 17, 1901. To this ruling of the court the complainant objected, and moved the court to hear the cause upon the general issues made in the case and offered in support thereof, to give in evidence its proofs filed therein; this request was overruled by the court and the complainant excepted. (Rec., p. 98.)

Thereupon the complainant moved the court to hear the cause upon all the issues made in the case, including that of the said plea, which request the court refused, and the complainant excepted. (Rec. p. 98.)

Thereupon the defendants in support of their said plea offered in evidence the transcript from the record of the Circuit Court of Defiance County, in the said case of The City of Defiance, by its solicitors, vs. The said Council and the Defiance Water Co., with the certificates thereunto attached, filed in the court on *May 28th*, 1901, which case was then pending in the Supreme Court of Ohio (Rec., p. 204); to the receiving this in evidence the complainant, by its counsel, objected, on the ground that it does not purport to be and the certificate of the clerk does not show it to be, a complete transcript of the record and proceedings of the case. "To the ruling of the court admitting this in evidence the complainants excepted. (Rec., pp. 98, 99 and 148-195. The clerk's certificate to this transcript is on page 194 and the date of filing "May 28th," is at the end, middle of page 195.) This was all the evidence offered by the defendants in support of their said plea. (Rec., p. 99.)

Thereupon the complainant offered in evidence on the said issue its proof on said plea: *First*, a transcript of the record and proceedings of the said Circuit Court of Defiance County in the said case, which the court refused to receive (Rec. p. 99; see clerk's certificate to this transcript,

Rec. p. 196); *second*, the deposition of W. A. Schmaltz, clerk of said Circuit Court of Defiance County, which the court refused to receive in evidence. (Rec. pp. 99 and 205–209); *third*, a certified transcript of the record of the adjournment of the March term, 1901, of the said Circuit Court of Defiance County; which the court refused to receive in evidence. (Rec. pp. 99 and 195.) The court held that the said supplemental plea ought to be sustained, and the complainant excepted. (Rec. p. 99; and see certificate of Clerk Belford to transcript of record, paragraphs 3 and 4, page 213 of printed record, and pp. 195 to 209 of printed record.)

The complainant then "moved the court to hear the cause upon the issues formed by the bill as amended, the supplemental bill, the answer and the replication thereto, on the ground that the said plea does not reach the whole of said issues, and that as to them said plea ought not in law and in equity to avail the defendants; and the complainant offered to give in evidence its proofs on file in support of said issues; but the court refused the said request and held that said plea extended to and was conclusive of all the said issues." To this ruling the complainant, by its counsel, excepted. (Rec. p. 99, seeclerk Belford's certificate to transcript, paragraph 2, p. 213 of printed record, and printed record pp. 104 to 147.)

The court then dismissed the complainant's suit and final decree was rendered for the defendants, and exception taken by the complainant. (Rec. p. 100.)

From this decree an appeal has been taken to this court.

## Assignment of Errors.

The assignments of error made by the complainant, in praying for its appeal appear on pages 100–102 of the printed record and are in substance as follows:

1st. That the Circuit Court erred in its order of June 17, 1901, in allowing the defendants to file said supplemental plea and with it the record of the State court.

2d. The said court erred in holding said plea sufficient in law.

3d. The court erred in refusing to hear the cause on the general issues and the proofs offered by the complainant.

4th. The court erred in refusing to hear the cause upon all the issues made in the case including the said plea and the proofs offered by the complainant.

5th. The court erred in receiving in evidence the transcript of the record of the Circuit Court of Defiance County, in the case named.

6th. The court erred in refusing to receive in evidence on the issue made by the said plea and the replication thereto the whole or any part of the proofs offered by the complainant. (Under this the assignments are made specific, record pages 101, 102.)

7th. The court erred in holding that said plea ought to be sustained.

8th. The court erred in refusing to hear the cause upon the issues to which the said plea did not reach and the proofs in support of the same.

9th. The court erred in holding that the said plea extended to the whole of said issues and was conclusive of the same.

10th. The court erred in its final decree dismissing said suit with costs to defendants.

The complainant has filed in this court, and the same are printed in the record, its proofs on the general issues taken and filed in the Circuit Court, prior to the filing of the supplemental plea, pages 104–148 of the printed record, being pages 177 to 246, inclusive of the original transcript filed in this court. See clerk Belford's certificate to transcript. (Rec. p. 213.)

## ARGUMENT.

### I.

THE CIRCUIT COURT SHOULD NOT HAVE PERMITTED THE SUPPLEMENTAL PLEA TO BE FILED (called by defendants "supplemental answer and amendment to original answer." See motion, opinion of the court, supplemental plea and order allowing motion, record pages 87–96).

*First:* **Such a plea *in bar* of the suit is not known in equity practice. If competent to have permitted the paper to be filed, it should have been filed as defendant's counsel first attempted, as a supplemental *answer*.**

Beach Eq. Prac., Sec. 423.

But any matter *de hors* the record though occurring pending suit should have been pleaded in a cross-bill.

At hearing in the Circuit Court, counsel for the defendants relied on Sec. 154 Foster's Fed. Practice in support of their right to file their supplemental defense. Foster again refers to this matter in the last paragraph of section 171. The authorities cited by him under both sections do not support the text. Neither in *Kelsey* v. *Hobby*, 16 Pet. 277, nor in *Coburn* v. *Cedar, etc., Co.*, 138 U. S. 196, 222, was the question involved or decided. In *Suydam* v. *Truesdale*, 6 McLean, 459, the application was refused; *E. A. Co.* v. *Brush El. Co.*, 44 Fed. Rep. 602, 607, related to a supplemental *bill*; while it is expressly held in *Banque Franco-Egyptienne* v. *Brown*, 24 Fed. 107, by Judge Wallace, that "the correct practice requires" such matters to be set up "by means of a cross-bill" and not by way of a supplemental answer.

And see Story's Eq. Pl., Sec. 393.

*Second:* The same question in substance had been passed on twice before in the same court, once by Judge Severens on what the defendants call a "Motion to stay proceedings." (Rec., pp. 80–85; 100 Fed. Rep. 178), and again by Judge Wanty on a similar application. The motion and order of Judge Wanty seem to be omitted from the record, but the decision is referred to by Judge Wing in his opinion Rec., p. 88.

*Third:* **"To make a matter *res adjudicata*, there must be a concurrence—1. Of identity of the subject-matter; 2. Of the cause of action; 3. Of person and parties; and 4. In the quality of the persons for or against whom the claim is made."**

Freeman on Judgments, 4th Ed., Sec. 252.

**And it must appear in the plea, that the same issue was joined in the former suit, as in the bill, and that the proceedings were for the same object and purpose.**

Story's Eq. Pl., 9th Ed., Sec. 780a, last par.

(1.) The parties here are not the same. The suit in the State court being by the city against the council, the Water Company being merely nominal. No relief whatever is prayed for against the Water Company in the petition in the State court, and the real defendant there, the city council, admits in its supplemental plea that it made no defense, but avers that "the council of the city of Defiance failed to answer or demur to the said petition of said plaintiff in said action in said State court." (Rec. p. 93.)

(2.) The subject-matter of the two suits is not the same. The suit in the State court being to enjoin the council from paying anything on the alleged illegal contract; while in the suit here the Water Company seeks not only to enforce the contract but also to collect the value of its water used by the city, whether the contract may be held legal or otherwise.

It appears from the record, the original bill filed in this suit, the defendants' supplemental plea, and the pleadings in the State Circuit Court filed by the defendants in support of their plea that the complainant could not have the relief in the State court prayed for by it in its bill here. In the suit in the State court the city merely prays for an injunction to restrain the council from paying the Water Company its hydrant rentals. The Water Company in its defense denies only the right of the city to such relief, while in its bill in this suit it not only seeks to prohibit the defendants from denying the validity of its contract and to enforce it, but it also prays for an accounting for the water used by the city before and pending suit.

(See supplemental plea, Rec. pp. 89–94; transcript filed in support of the plea, petition pp. 148–150; demurrer to petition and judgment of the Court of Common Pleas on same, pp. 157, 158; answer of the water company in the Circuit Court of Defiance County, pp. 166–174, especially last paragraph and prayer of the answer, p. 174; original bill herein, (Rec. pp. 1–10 and amendments, pp. 25–27, especially next amendment to last, p. 26; and prayer for relief, p. 10).

Not only was no affirmative relief asked for in the State courts, but in the nature of the suit the State Circuit Court had no jurisdiction to afford it. The Circuit Court took the case by appeal from the Court of Common Pleas, and the case was necessarily tried on appeal upon the issues made in the Court of Common Pleas. The claim of the Water Company not having been set up in the Court of Common Pleas, the Circuit Court had no original jurisdiction of it.

Section 6 of Art. IV of the Constitution of Ohio provides that "the Circuit Court shall have * * * such appellate jurisdiction as may be provided by law." Section 5226 of the Revised Statutes of Ohio provides than "an appeal may be taken to the Circuit Corrt * * * from a judgment * * * rendered by the Common Pleas Court * * * if the right to demand a jury therein did not exist," and section 5225 provides that the trial in the Circuit Court "shall be conducted in the same manner as in the Common Pleas Court, and upon the same pleadings."

And see:

*Grant* v. *Ludlow's Adm'r*, 8 O. St. *32*.

*Wilson* v. *Wilson*, 30 O. St. 365.

*Bickett* v. *Garner*, 21 O. St. 659.

*Witte* v. *Lockwood*, 39 O. St. 141.

(3.) The capacity in which the parties sue is different; in the State court the city sued *by its city solicitor* in right of the people, not in its own right; it is really the suit of the people through the city.

Rev. St. of Ohio, Sections 1777 and 1778.

*Jones et al.* v. *Kilbreth*, 49 O. St. 401.

*Laggott* v. *Great Northern Ry. Co.*, 1 Q. B. D. 599.

*The parties must be adversary in both suits.*

*McCrory* v. *Parks*, 18 O. St. 1, 2d prop. syl. and pp. 7, 8.

*Graham* v. *Railroad Company*, 3 Wall. 704.

Generally on this third point we cite the following:

*The Lessee of Lore* v. *Truman*, 10 O. St. 45.

The first proposition of the syllabus is as follows:

"Where a judgment or decree is relied on by way of evidence, as conclusive *per se* between the parties in a subsequent suit, it must appear by the record of the former suit, that the particular controversy sought to be precluded was therein *necessarily* tried and determined;" and see opinion, pp. *54–56*.

In *Cromwell* v. *County of Sac*, 94 U. S. 351, in the opinion of the court on page 352, Mr. Justice Field says:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon its merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Further on page 353:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

This case is followed in

*Nesbitt* v. *Riverside Independent District*, 144 U. S. 610,

and in

*Roberts* v. *Northern Pacific R. R. Co.*, 158 U. S. 1, *27–29*.

In *McComb* v. *Frink*, 149 U. S. 629, 639–641, it was held that one essential to an estoppel by judgment is identity of cause of action, and that the cause of action in the judgment of the Supreme Court of Massachusetts, was not shown to be the same as that in the Federal court.

See further:

*Aspden* v. *Nixon*, 4 How. 467, *497*, *498*.

*Stryker* v. *Goodnow*, 123 U. S. 527, *538*.

*Wilmington & Weldon R. R. Co.* v. *Alsbrook*, 146 U. S. 279, 302.

*Wash. Alex., etc., Steam Packet Co.* v. *Sickles*, 24 How. 333.

*Davis* v. *Brown*, 94 U. S. 423, 428, 429.

*Russell* v. *Place*, *Idem*, 606.

*Fairchild* v. *Lynch*, 99 N. Y. 359.

*Chrisman's Admx*, v. *Harmon*, 29 Gratt. 494 (26 Am. Rep. 387).

*Lewis* v. *O. N. & P. Co.*, 125 N. Y. 341, *348*.
*Bell* v. *Merrifield*, 109 N. Y. 202, 211–214.
*Jones* v. *Kilbreth*, 49 O. St. 401.

Even when a counter-claim is set up in the former suit, but not actually adjudicated the defendant is not estopped from maintaining a separate action on it.

*Man'f'g Co.* v. *Colgate*, 12 O. St. 344.

But he is not required to plead his counter-claim as a defense to the former suit; he may withhold it and sue his claim in a separate action.

*Witte* v. *Lockwood*, 39 O. St. 141.

*Fourth:* **The decisions of the court below, as announced by Judge Severens, (90 Fed. Rep. 753, and 100 Fed. Rep. 178,) should have been adhered to by Judge Wing, and he should have refused to open up this controversy by permitting the supplemental plea to be filed.** This principle is well stated by Judge Coxe in *Wakelee* v. *Davis*, 44 Fed. Rep. 533, as follows:

"It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the judge who presided; it is the law of this court, to be followed upon similar facts until a different rule is laid down by the Supreme Court. A re-examination and discussion of the questions involved is, therefore, unnecessary, for the reason that the court is constrained to follow its former decision."

This case was affirmed by this Supreme Court, 156 U. S. 680.

It has been repeatedly held by this court that in cases involving the construction of contracts, and even of state statutes, the Federal courts will construe them for itself, according to general principles of law, where a construc-

tion has not previously been put upon it by the Supreme Court of the state in which the cause of action arises.

*Douglass* v. *County of Pike*, 101 U. S. 677.

*Rowan* v. *Runnels*, 5 How. 134.

*Ohio Life Ins. etc., Co.* v. *Debolt*, 16 How. 416, *432*.

*Loeb* v. *Columbia Twp. Trustees*, 179 U. S. 472, *492*.

*Capital City Light, etc., Co.* v. *Tallahassee*, 186 U. S. 401.

On page 406 this court says:

"As the case involves the provision of the Federal Constitution, which prohibits the states from passing any law impairing the obligation of a contract, and as the State court has given effect to subsequent legislation, which, it is claimed, resulted in the impairment of the obligation of plaintiff's contract with the city, we are bound to determine for ourselves as to the existence and meaning of the alleged contract, in order to determine the question whether subsequent legislation has impaired the obligation thereof."

In *Burgess* v. *Seligman*, 107 U. S. 20, in the opinion of the court on page 32, Mr. Justice Bradley says:

"But the appellant's counsel, with much confidence, press upon our attention the decision of the Supreme Court of Missouri, on the questions involved in this case, and on the very transactions which we are considering. That court since the determination of this case by the Circuit Court, has given judgment in two cases adversely to the judgment in this, and to the views above expressed." * * * (And on page 33.) "We have read the opinion of the court and the dissenting opinion of one of the judges with much attention, but we are unable to come to the conclusion reached by the majority."

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred, and when the case was under the consideration of the Circuit Court, no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws."

And again: "But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

And see

*Butz* v. *City of Muscatine*, 8 Wall. 575, *582*.

*L. & N. R. R. Co.* v. *Palmes*, 109 U. S. 244, *255*, *257*.

*Jefferson Bank* v. *Skelly*, 1 Black. 436.

The above is as to the decisions of the highest courts of the State in conflict with decisions of the Federal courts, but the decision which the court below permitted to be pleaded in the supplemental plea in bar of the complainant's right to recover, was of the State Circuit Court of Defiance County, an intermediate court between the Court of Common Pleas and the Supreme Court, and that only on a question of law; in no sense was there any question of fact decided. The State Circuit Court held the contract of the Water Company illegal and granted a perpetual injunction against the payment by the city of any hydrant rentals, past or future, under it. It was this decision on *the law of the contract* merely that Judge Wing of the court below allowed to be set up in the supplemental plea *in bar* of our right of action. The decision of the State Circuit Court was no more binding on the Federal court than was the decision of the Court of Common Pleas, holding that the contract was valid for at least the term of twenty years, following the decision of Judge Severens in this case. 90 Fed. Rep. 753. We submit that this decision could not be pleaded in bar of our

action in the Federal court. The defendants could have availed themselves of whatever the decision was worth by citing it as an authority at final trial of the case.

*Stryker* v. *Goodnow*, 123 U. S. *538*.

*Fifth:* It was shown to the court below, both on the application for leave to file the supplemental plea and at the final hearing that the judgment there pleaded in bar of our suit had been taken to and was then pending in the Supreme Court of Ohio. The State case was taken into the Supreme Court of Ohio, May 25, 1901 (Rec. p. 204), leave was granted to file the supplemental plea June 17, 1901 (Rec. p. 96). We contend that while the judgment was pending on proceedings for reversal in the Supreme Court of Ohio, on a pure question of law (the construction of the contract), it could not be pleaded in bar of this suit, even if it were for the same cause of action.

2 Black on Judgments, Sec. 510.
Freeman on Judgments, Sec. 328.
*Murray* v. *Green*, 64 Cal. 303.
*Purser* v. *Cady*, 120 Cal. 214, *218*.
*Sherman* v. *Dilby*, 3 Nev. 21, *27*.
*Glenn* v. *Brush*, 3 Col. 26.
*Ketchum* v. *Thatcher*, 12 Mo. App. 185, *188*, *190*.
*Dolk* v. *Yelton*, 103 Tenn. 476.

*Sixth:* **The very purpose and object of bringing this suit was to get a construction of the Federal court of the contract, which, as we have stated above, will construe the contract for itself, and especially in this case where it appears in the bill that the suit in the State court was brought by collusion with the city solicitor and the council to enjoin themselves from paying the Water Company its hydrant rentals and that by means**

**of it the decision of the Circuit Court of the State was secured in favor of the city,** (statement of case, *supra*, pp. 1–11). It is a travesty on justice for the defendant to be allowed to plead a judgment obtained in such a way in bar of our right of action. In legal effect the judgment was procured by the fraud of the defendants and for that reason can not be pleaded as a defense to the bill.

Story Eq. Pl., Secs. 784, *794*, (9th edition).

*Arrowsmith* v. *Gleason*, 129 U. S. 86, *100*, *101*.

See also:

*Calhoun* v. *Millard*, 121 N. Y. 69, *76*,

approved by this court in

*Andes* v. *Ely*, 158 U. S. 312, *317*, *318*.

And see Pomeroy's Eq. Juris., Secs. 385, 397, *404*.

*Seventh:* **For the same reasons given above the court below should have held the supplemental plea insufficient in law. (Rec. p. 96, and 2nd assignment of error, p. 101.)**

II.

AT THE FINAL HEARING THE COURT BELOW ERRED:

*First.* The record offered in evidence in support of the supplemental plea should not have been received; it was not complete, hence did not support the plea. (5th assignment of error, Rec., pp. 101, 100, and 148–194.)

And the court should have received in evidence the complete transcript of the record of said case offered by the complainant. (6th assignment of error, Rec., pp. 101, 102, and 196–204.)

As the defendants were pleading the judgment in that case in bar of the complainant's right of action in this suit, the burden was on them to sustain, by *the complete record of*

*the case*, what the evidence given at the trial showed was actually litigated in that case, not only between the plaintiff and the defendants, but *between the defendants themselves*, the Water Company and the City Council, one of the defendants here.

Freeman on Judgments (4th Ed.), Sec. 276.
*Davis* v. *Brown*, 94 U. S. 423.
*Russell* v. *Place*, *Idem*, 606.
*Chrisman's Adm'x* v. *Harman*, 29 Gratt. 494, (26 Am. Rep., 387).
*Bell* v. *Merrifield*, 109 N. Y. *211*.
*Lewis* v. *O. N. & P. Co.*, 125 *Idem*, 341, *348*.

*Second.* The court below should have received in evidence the proofs offered by the complainant on the issue formed by said plea and the replication thereto, embraced in the sixth assignment of error, being the *complete transcript of the record of the* said case in the Circuit Court of Defiance County, the *sine die* adjournment of the term of said court, and the *deposition* of William A. Schmaltz. (Rec. pp. 99, 101, 102, 195–110.)

It appears conclusively from these rejected proofs that the judgment set up in defendants' supplemental plea is a nullity, having been made as well as entered long after the term had adjourned *sine die*. Mr. Schmaltz, the clerk of the court, testifies that he received the entry (of the judgment) by mail from the presiding judge on April 25th, with an order on it signed by the judges "to enter on the journal as of the date of March 15, 1901." And that he entered it on the journal under that date, on the "same day it was received" (April 25th). (Rec. pp. 206, 207.)

The March, 1901, term of the "court adjourned *sine die*" on March 15, 1901 (Rec. p. 195).

The case was heard and taken under advisement by the court March 12, 1901 (Rec. p. 200). The next entry on the journal is the judgment under date of *March 15th*, drawn by the judges and entered by the clerk *April 25th* (Rec. pp. 200–201). In this entry of theirs the judges recite that "to each and all of said findings and to said decision said defendant Water Company, by its counsel, then and there excepted." The next entry on the journal in the case is made in vacation, April 4, 1901, allowing a bill of exceptions to the defendant Water Company (Rec. pp. 201, 202). The most of this bill of exceptions is not printed here, but it appears (printed Rec. p. 203) that the bill of exceptions was allowed April 4, 1901, and the exception is to the "*finding* of the court in favor of the plaintiff."

It conclusively appears from the above that no judgment was rendered during the term; that the entry is not of a judgment *nunc pro tunc*, but that the judgment was rendered as well as ordered entered in vacation, *forty-one days after term*.

But even if the judgment had been announced during the term, it was not competent, under the practice in Ohio, to enter it after term.

*Coe* v. *Erb*, 59 O. St. 259, *275*, *276*.

In the opinion of the court, page 275, Chief Justice Spear says:

"As to jurisdiction, the Court of Common Pleas acquired jurisdiction of the parties and of the subject-matter. It pronounced a judgment during the term, but did not then enter it. One requisite of a judgment is that it must be given at the right time. As said by Bouvier, Law Dic., Vol. 2, page 15, 'To be valid, a judicial judgment must be given by a competent judge or court, at a time and place appointed by law, and in the form it requires. A judgment would be null if the judge had not jurisdiction of the matter, or, having such jurisdiction, he exercised it

when there was no court held.' Under our practice the court retains control of its journals during the term; it may then add to, strike out or alter that which is on the journals, or incorporate new matter On the final adjournment, however, that control is lost. This we take to be elementary. Confessedly the judge can not, in vacation after the term, render a judgment. How can he make an order affecting a judgment which he had in fact pronounced in term? an order necessary to complete the judgment and make it effective? While it can not be said that jurisdiction of the case had been lost, nevertheless an attempt to exercise jurisdiction at the time this entry is alleged to have been made, would, according to the authorities, have been as futile, at least as regards the rights of persons not parties nor privies, as though jurisdiction had in fact been lost because there was no court then to exercise it."

In *Muller* v. *Ehlers*, 91 U. S. 249, on page 250, in the opinion of the court, Mr. Chief Justice Waite said:

"Upon the adjournment for the term the parties were out of court, and the litigation there was at an end. The plaintiff was discharged from further attendance; and all proceedings thereafter, in his absence and without his consent, were *coram non judice*."

Further, page 251:

"A judge can not act judicially upon the rights of parties, after the parties in due course of proceeding have, both in law and in fact, been dismissed from the court."

See also:

*Bronson* v. *Schulten*, 104 U. S. 410, *415*.

The conclusion follows from the above that the Circuit Court erred in its holding that "the said plea ought to be sustained." (Rec., p. 99.) This is covered by the seventh assignment of error, *supra*, *p.* 11. (Rec. p. 102.)

III.

AT THE FINAL HEARING THE COMPLAINANT'S COUNSEL REQUESTED THE COURT TO HEAR THE CAUSE UPON THE GENERAL ISSUES AS WELL AS UPON THE SUPPLEMENTAL PLEA, CLAIMING THAT THE PLEA DID NOT REACH TO ALL OF THE ISSUES, and offered to give in evidence its proofs on file in support of said issues.

"*But the court refused the said request and held that said plea extended to and was conclusive of all of said issues.*" (Rec., first two paragraphs, p. 98, and last paragraph of p. 99.)

These rulings of the court below are covered by the 3rd, 4th, 8th, 9th and 10th assignments of error, *supra*, pp. 10, 11. (Rec. pp. 101, 102.)

Equity rule 33 provides that:

"If upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him."

That is, *only* so far as they ought to avail him.

*Pearce* v. *Rice*, *142* U. S. 28, *42*.

In the opinion of the court in *Horn* v. *Detroit Dry Dock Co.*, 150 U. S. *625*, it is said:

"But even under this rule *when the plea meets and satisfies all the claims of the bill*, it ought, in law and equity, to avail the defendant so far as to require a final decree in his favor."

Under this construction of the rule, the strongest against the appellant that can be given, it is clear that the supplemental plea did not meet and satisfy all the claims of the bill? (See statement of case, *supra*, pp. 1–6.) Indeed, it fails to meet nearly all of the material issues of the bill.

*First:* **The principal theory of the bill is that the defendants, after the large expenditure of the complainant in the construction and maintenance of its water works, and after having enjoyed the benefits of the contract, and acted on it for ten years, and still retaining possession of and using the fire hydrants under the contract, are estopped from repudiating and attempting to abrogate it or denying its existence and validity, and the object and prayer of the bill is to enforce the contract against the defendant.**

A municipality, like a private person, may be estopped from asserting a stale claim against a party whom it has permitted to act on it to his injury, by which means it has received benefit during a long period of its acquiescence.

*Elster* v. *Springfield*, 49 O. St. 82, *98*.

*City of Cincinnati* v. *Evans*, 5 O. St. 594.

*Moran* v. *Com's of Miami County*, 2 Black, 722.

*State ex rel. Garrett* v. *Van Horn*, 7 O. St. 327, *331*, *332*.

In *County of Randolph* v. *Post*, 93 U. S. 502, in its opinion on page 513, the court says:

"We should unreasonably restrict the rights and powers of a municipal corporation were we to hold that it did not possess the power to alter its legally made contract by waiving conditions found to be injurious to its interests, or that it could not estop itself, like other parties to a contract." Citing: Bigelow on Estoppel, 464; *Moran* v. *Commissioners*, 2 Black, 722; *Zabriskie* v. *Cleveland*, 23 How. 400; *Pendleton* v. *Avery*, 13 Wall. 297; 1 Dill. Mun. Corp., Sects. 375, 383, 385, 398.

See also:

*Moore* v. *Mayor*, 73 N. Y. 238.

This was a contract not *malum per se* nor against public policy, nor *ultra vires* in the sense that it was prohibited by

law; on the contrary municipal corporations were expressly authorized by statute to enter into such contracts and they were everywhere necessary for the public welfare; at worst it was a contract duly enacted by the city council but not ratified by the people's vote.

So that in this case the doctrine of *ultra vires* "will not be allowed to prevail to defeat the ends of justice or to work a legal wrong."

*Railroad Company* v. *McCarthy*, 96 U. S. 258, *267*.

On this question of estoppel and acquiescence see

*Ely* v. *Kellogg*, 15 O. St. 64.
*State ex rel.* v. *Mitchell*, 31 Id. 592.
*Tone* v. *City of Columbus*, 39 Id. 281.
Pomeroy's Eq. Juris., Secs. 816, 817.
*Newberg Petroleum Co.* v. *Weare*, 27 O. St. 343, 3d prop. of Syl.

In *County Com'rs* v. *Hunt*, 5 O. St. 488, 496 (for facts of case see page 489, *et seq.*), it was held that "there was a clear, moral obligation on the county to either give up the property or make compensation," and that "the court ought not to interfere by injunction to save the county from the payment of a demand having the sanction of moral obligation."

The case at bar comes directly within the decision of this Supreme Court in the case of

*Hitchcock* v. *Galveston*, 96 U. S. 341, which is conclusive of the whole matter in favor of the Water Company.

In that case the court in its opinion, by Mr. Justice Strong, says: (p. 350.)

"It matters not that the promise was to pay in a manner not authorized by law. If payment can not be made in bonds because their issue is *ultra vires*, it would be sanc-

tioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force so far as it is lawful."

And further on page 351:

"At most there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest only *ultra vires;* and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it can not object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform. This was directly ruled in *The State Board of Agriculture* v. *The Gitizens Street Railway Co.*, 47 Ind. 407. There it was held that 'although there may be defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of a statute prohibiting it, and the corporation has by its promise induced a party relying on its promise and in execution of the contract to spend money and perform its part thereof, the corporation is liable on the contract.'" Citing cases in support of the proposition.

The principle is that execution contracts orginally *ultra vires* should stand good for the protection of rights acquired under a completed transaction.

*Parish* v. *Wheeler*, 22 N. Y. 494, 508–510.

In *Citizens' Water Co.* v. *Bridgeport, etc.*, 55 Conn. 1, it is held to be the duty of courts to presume contracts inviolate, and that *even if the common council had no power to make the grant named*, the defendant company having organized and acted on it, it became as effective as if the city had had the power to make it.

In *St. Louis, V. & T. H. R. R. Co.* v. *Terre Haute & Ind. R. R. Co.*, 145 U. S. 393, it was held that:

"A lease for 999 years by one railroad corporation of its railroad and franchise to another railroad corporation

which is *ultra vires* of one or both, will not be set aside by a court of equity at the suit of the lessor, when the lessee has been in possession, paying the stipulated rent, for seventeen years, and has taken no steps to repudiate or rescind the contract."

Mr. Justice Gray, in the opinion of the court (page 402), says:

"This was, in substance and in effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorized by the state which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action nor suit by either against the other." Citing authorities.

And again (page 408):

"The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; *and the defendant has held the property and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.*

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders, and seeking to protect their interests, it and they are barred by laches."

In the case of *Cook* v. *Com's of Hamilton County*, 6 McLean, 612 (in the U. S. C. C., Southern Dist. of Ohio), it appears from the opinion of the court, by Justice McLean, that the action was brought to enforce "a contract between the parties for the building of a court house and jail by the plaintiffs, for Hamilton county" (page 613,) not first submitted for approval to the voters of the county. It seems that an act of the legislature of Ohio, of 1848, was as follows (opinion of the court, page 619):

"That the commissioners shall not enter into any contract to build any poor house, or any other public building, which requires the expenditure of more than five thousand dollars, without first submitting as to the policy of such outlay, to the qualified voters of the county at the annual spring or fall election, by giving public notice, etc. And all contracts in violation of this section shall be void, as against the county."

In regard to this, on page 615, Justice McLean says:

"That contracts should be submitted to a popular vote, after they have been solemnly entered into, or notice given as the law required, is a new principle of constitutional law. It certainly affords no justification for breaking up the contract.

"When the sacredness of contracts, fairly entered into, shall be disregarded, under any pretense, there will be an end of all confidence and protection of persons and property. And where a contract is broken up without cause, it places the injured party on the same ground, in regard to an action for damages, as if he had performed the contract."

* * *

"The plaintiffs are entitled to compensation for the work done and the materials procured, at the time they were discharged from the contract."

In *Hutchinson & Southern R. R. Co.* v. *Board of Com's*, 48 Kan. 70 (30 Am. St. 273), it is held that the doctrine of estoppel applies to municipal corporations as to matters within the scope of their powers and the powers of their officers, so as to bind them by their acts of acquiescence, whenever an estoppel would exist in the case of a natural person. It is further held that a finding, on the part of the county commissioners, that the preliminary steps to validate the issue of bonds in aid of a railroad, one of which was the signing of a petition by two-fifths of the tax-payers of the township for an election to vote to issue bonds, estopped them from denying that the petition was so signed, where there had been laches on their part, in objecting to the issuing of the bonds. *In the opinion of the court, there is*

*an exhaustive review of these questions of estoppel, laches and acquiescence, and we call the special attention of this court to it.*

In *City Ry. Co.* v. *Citizens R. R. Co.*, 166 U. S. 557, the City of Indianapolis undertook to extend the charter of the Citizens Co. from thirty years to thirty-seven years, on the faith of which the company issued bonds and incurred certain other obligations; *held*, that the circumstances connected with the passage of the ordinance, extending the charter, operated to estop the city from denying that the charter was extended to thirty-seven years, and that the company had a valid contract with the city for the thirty-seven years.

That case is conclusive in favor of the Water Company of the validity of its contract with the city for the period of thirty years from August 17, 1887.

In *Doe d. Pennington* v. *Taniere*, 7 Eng. Rul. Cases 353 (12 Q. B.—Ad. & El. N. S.—998) the rule is established that "where a corporation have acted upon an executed contract, it is to be presumed against them, that everything necessary to make it a binding contract on both parties was done—the corporation having had all the advantage they would have had if the contract had been regularly made."

In *Seymour* v. *The Spring Forest Cemetery Ass'n*, 144 N. Y. 333, the court evidently had in mind such persons as the defendants in error in this case, saying in their opinion, page 341, "That kind of plunder which holds on to the property, but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state. * * * It must therefore pay, or its possession becomes robbery."

*Wright* v. *Hughes*, 119 Ind. 324 (12 Am. St. 412) holds that a corporation will not be heard to assert the invalidity of a transaction while retaining its fruits.

To the same effect are

*Sherman Center Town Co.* v. *Morris*, 43 Kan. 282, 19 Am. St. 134.

*Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62, *68*, *69*.

*Los Angeles* v. *Los Angeles Water Co.*, 177 U. S. 558.

*Houston & Tex. R. R. Co.* v. *Texas*, *Idem*, 66.

*Supervisors* v. *Schenck*, 5 Wall. 772.

*Zabriskie* v. *C., C. & C. R. R. Co.*, 23 How. 381, and last par. of opinion, 400.

*Brown* v. *City of Atchison*, 39 Kan. 37 (7 Am. St. 515, *529*).

In *Hubbard* v. *Norton*, 28 O. St. 116, the court say (page 133):

"We think the action of the city authorities, in treating this contract as a continuing and binding obligation, in supervising and accepting the work, and in delivery of this assessment in payment thereof, after knowledge of this defense, was the exercise of a discretion vested in them, binding on the public, whose agents they were; and that by reason thereof, and because the plaintiffs in error failed to enjoin the prosecution of the work, they are now estopped from interposing this defense as a bar to a recovery for any amount."

*State ex rel.* v. *Trustees of Union Twp.*, 8 O. St. 394, 401, 402, 403.

The court says on page 402:

"Indeed the defense proposed to be set up, that in issuing these securities the township had not been careful in all respects to comply with the provisions of the statutes under which the proceedings were had, would seem to savor too much of taking advantage of one's own wrong to meet favor in a court of justice. It would certainly be counter to the spirit of the maxim, *nemo ex suo delicto meliorem suam conditionem facere potest.*"

*State* v. *Van Horn*, 7 O. S. 327, 332.

*City of E. St. Louis Gas, etc., Co.*, 98 Ill. 415 (38 Am. Rep. 97, 101, 103.)

The court says on page 101 Am. Rep:

"There can be no doubt that it was within the scope of the authority of the city to contract upon the subject. There is nothing of illegality in the contract, such as requires that it should be held void in the whole—the part performed as well as that not performed; and what the city has received and enjoyed the benefit of, under the contract, there is no principle of law which will justify it in its refusal to pay for."

*Trustees of Goshen Twp.* v. *Shoemaker*, 12 O. St. 624.

In which the court say on page 627:

"An application for relief of this kind will also be affected by *laches* and acquiescence. Such acquiescence, while it may confer no right on the other party, will preclude the plaintiff from relief in a court of equity."

*Shoemaker* v. *Goshen Twp.*, 14 O. St. 569, 584, 588.

*Anthony* v. *same*, *Id.* 588.

And see the case of *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65, 80, 81, where this court had in consideration a contract between the city and the same Samuel R. Bullock & Company who made the Defiance contract with which it is in many respects identical.

Further, under Sec. 5 of the contract (Rec. p. 14) it was the duty of the city council to submit the contract for ratification to a vote of the electors of the city, if necessary "*to vest in the Water Company the rights and privileges therein granted*," and the city was estopped to deny in its suit in the State Court that this was done. After this contract had been acted on for ten years the law presumes it was so ratified. A court of equity must hold that "what *ought* to be done was done."

Pomeroy's Eq. Juris., Secs. 364, 365.

We have argued this question of estoppel very fully, not only to show to the court that the supplemental plea does not

reach to this issue, but we shall claim hereafter that on the averments in the bill and admissions made in the answer the complainant is entitled to the decree as prayed for in the bill.

*Second.* **Section 1777, Revised Statutes of Ohio, did not authorize the suit in the State court, as against this appellant.**

So far as relates to this case said section is as follows:

"He (the city solicitor) shall apply in the name of the corporation to a court of competent jurisdiction for an order of injunction to restrain the misapplication of the funds of the corporation, or the abuse of its corporate powers, or the execution of or performance of a contract made in behalf of the corporation in contravention of the laws or ordinance governing the same."

The law applies only to contracts *not executed;* it can not be said to be a misappropriation of the city's funds to pay for water it had already received and used under the contract.

*State* v. *Coms.*, 56 O. St. 718, *720.*

See same case, 13 O. C. C. Rep. 15.

Nor do the averments in the plaintiff's petition, in the State court, give jurisdiction to that court to render the judgment which it rendered against the Water Company. The contract is not asked to be vacated nor is there any relief prayed for against the company. There is absolutely nothing in the petition to connect the Water Company with having anything whatever to do with the making of the contract. (See petition, Rec. pp. 148–150, and judgment of the State Circuit Court, p. 193.) The city solicitor could not treat this contract as void as to the Water Company, in this arbitrary manner.

*Cin. & Springfield Ry. Co.* v. *Carthage*, 36 O. St. 631–634,

and it was not competent for the court to enjoin the Water Company from enforcing the contract.

*Walla Walla City* v. *Water Co.*, 172 U. S. 1, *22*, *23*.
*St. L. R. R.* v. *T. H. R. R.*, 145 U. S. 393.

The city could not go into a court of equity to procure a judgment in this *indirect* way against the Water Company.

This was a question at issue before the Federal Circuit Court and one which it should have decided for itself.

## IV.

ON THE BILL AND THE ADMISSIONS MADE IN THE ANSWER THE COMPLAINANT WAS ENTITLED TO A FINAL DECREE IN THE COURT BELOW FOR THE RELIEF PRAYED FOR.

We respectfully submit that such a decree should be ordered by this court. Under the averments in the bill and the admissions (see statement of the case, *supra*, pp. 1–11) the amount due the complainant, January 1, 1903, when the last installment for hydrant rentals fell due, is determined by a mere computation of interest; there was principal $33,811.50 and interest $4,958.33, total $38,769.83.

The sufficiency of facts such as those set out in our bill to warrant the relief prayed for has been decided lately by this court. In the case of *Vicksburg Water Works Co.* v. *Vicksburg*, 185 U. S. 65, the same relief was asked in a bill which set out facts strangely similar to those in this case. A contract had been entered into by the City of Vicksburg and the same Samuel R. Bullock & Company who made the Defiance contract, which in many respects is identical with it. Both parties had performed the contract for many years. The city had passed resolutions denying its liability and refusing to pay at the contract price, and had voted to issue

bonds and build a plant of its own, and had brought suit in the State court to declare the contract void on the ground that it was *ultra vires* and exceeded the legal term. The Water Works Company then filed its bill in the United States Court to enjoin the threatened impairment of the contract. In the opinion by Mr. Justice Shiras (pp. 80, 81, 82) the court said:

"It can not be seriously contended that, under the act of March 18, 1886, authorizing the city to provide for the erection and maintenance of a system of water works, and to contract with the party or parties to build and operate water works, and under the ordinance of the city of November 18, 1896, providing for a supply of water to the city and its inhabitants by contracting with Samuel R. Bullock & Company, their associates, successors and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the city to make; the terms were explicitly set forth in the ordinance; the works erected were approved by the city, and the respective obligations created by the contract were duly complied with without question or complaint, for a period of fourteen years.

"After the lapse of that long period and the continuous acquiescence of the city in the contract as a valid and subsisting one, the city, according to the allegations of the bill, now insists that the said contract was invalid because in excess of its powers to contract, and is proposing to borrow money to erect and maintain water works of its own, and become a competitor with the complainant for the custom of the consumers of water. And the question for our consideration is whether the subsequent legislation, state and municipal, set forth in the bill, impairs the contract rights of the complainant within the protection of the Constitution of the United States.

* * * * * * *

"Whether this act of the legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the city of November

7, 1900, whereby the mayor was instructed to notify the water works company that the mayor and aldermen deny any liability upon any contract for the use of the water works hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract; and that, therefore, unless the city can point to some inherent want of legal validity in the contract, or to some such disregard by the water works company of its obligations under the contract as to warrant the city in declaring itself absolved from the contract, the case presented by the bill is within the meaning of the Constitution of the United States and within the jurisdiction of the Circuit Court as presenting a Federal question."

In the case at bar the proof of the impairment of the contract is entirely convincing.

On December 6, 1895, the city passed a resolution looking to the termination of the contract without complainant's consent and taking steps toward a bond issue of $75,000, and the building of a plant of its own. (Exhibit C, of defendant's answer, Rec. p. 73.)

On January 7, 1896, a resolution was passed reciting that no valid contract existed, that the service be discontinued and a different supply provided and declaring that no further payments be made for hydrant rentals at contract rates. (Exhibit D to defendant's answer, Rec. p. 74.)

At the spring election, April, 1896, the question of issuing the $75,000 of bonds for erecting a plant by the city, was submitted to the voters and carried by a large majority. (Rec. pp. 130, 131.)

On February 16, 1897, pursuant to a resolution of the city council, the water committee of the city council reported that the complainant had no "franchise" (meaning

contract) (Rec. pp. 145, 146, 147). And the council passed a resolution to provide a new contract against the will of the complainant, and directing the city solicitor to bring suit to enjoin the company from protecting its rights by shutting off the water (Rec. p. 147).

On March 12, 1897, a resolution was passed by the city council providing for an investigation by the water committee of the probable cost of water works for the city and the approximate income number of consumers in the city, etc. (Rec. p. 131.)

And finally on June 4, 1898, the city solicitor, by the collusion and procurement of the council, brought suit in the Court of Common Pleas of Defiance County to enjoin the city council from paying the Water Company anything for water received and used before that time or to be used afterward.

We have brought our proofs, on the general issues, filed in the court below, into this court, not that this court will look outside of the bill, answer and replication to determine these issues, but that, if disputed, this court can see for itself on inspection, that our proofs fully sustain all the charges of the bill.

Respectfully submitted,

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
*Solicitors for Appellant.*

ROBERT W. BINGHAM, *of Counsel.*

# SUPREME COURT OF THE UNITED STATES

THE DEFIANCE WATER COMPANY,
Appellant,
vs.
THE CITY OF DEFIANCE, ET AL.,
Appellees.

October Term, 1902
No. 257.

## Supplemental Brief for Appellant.

Counsel for the appellees argue that the plea of *res judicata* was properly received in the Court below and that it extended to all the issues in this case. On the other hand we contend:

**1. The plea of *res judicata* was not sufficient in law and should not have been received.—**

**(a) Because the decision plead was on a question already adversely decided by the U S. Court for itself, before the State Court acquired jurisdiction.**

The bill was filed in the Court below on June 24, 1898 (Rec. p. 1). Demurrers were filed by the defendants July 8, 1898, and renewed October 19, 1898, and on December 30th they were heard by the Court and overruled, his Honor Judge Severens sitting (Rec. p. 31), and the Court held that the contract was valid and that the bill presented a good cause of action. That decision was reaffirmed by Judge Severens upon re-argument at the request of the defendants, and later in effect, by Judge Wanty, and stood unqualified during preparation of the case for trial and down to final decree December 21, 1901. Meanwhile in the state case final judgment was given on demurrer January 16, 1899, in favor of the Water Company, the Court holding the contract valid for at least twenty years. Trial on appeal in the State Circuit Court was not had until March, 1901, when that Court decided against the Water Company. It was this decision which Judge Wing allowed to be plead in bar of this action in the Court below. It ought not to have been given any consideration in the Federal Court, because in reaching it the State Court had ignored the prior decision of the Federal Court on the same question, and because that prior decision had become the law of the case in the United States Court between the parties and controlling therein until properly reviewed.

The principle of this—That a decision on a demurrer is the law of the case to be followed in the same Court on similar facts until set aside or reversed in a proper proceeding—has become well settled. It becomes a matter of record not to be disputed, except on different facts; especially not to be disputed by the record of another court. In the United States

Court its own record must prevail over any other. The following authorities we think, fully sustain this position:

His Honor, Mr. Justice McKenna, then Circuit Judge, in the case of Bowdoin College vs. Merritt, 63 Fed, Rep. 213, 215, held that the decision of another judge on a demurrer in the case, became the law of the case and must be observed.

Mr. Justice Field said in the case of Cole Silver Mining Co. vs. Water Co., 1 Sawyer 685, case No. 2990, 6 Fed. Cas. 72:

"The circuit judge possesses equal authority with myself in the circuit, and it would lead to unseemly conflicts if the rulings of one judge upon a question of law should be disregarded, or be open to review by the other judge in the same case."

This was followed and quoted by Judge Pardee in Preston vs. Walsh, 10 Fed. Rep. 315, saying:

"Justice Field on the ninth circuit, in the case of Cole Silver Mining Co. vs. Virginia & Gold Hill Water Co., 1 Sawy. 685, refused to hear questions of law previously determined by the circuit judge in the same case, . . . . . .

"The proposition, so evident upon its face, acquires greater force when the circuit judge is called upon to consider the rulings of the circuit justice in the same case. See 2 Fish. Pat. Cas. 120. This case has been before this court for hearing upon demurrer and for injunction pendente lite, and was heard and decided by my predecessor, Judge Woods, now circuit justice of this circuit. . . . . .

"So far then as any of these questions now come up for consideration in determining the rights of the parties now before the court, they must be taken as settled for this case in this court, if for no other case nor any other court. And for further authority see Aurora City vs. West, 7 Wall. 99."

In this last case also the bill had been amended since the

decision of the demurrer, making it direct authority against the appellees who contend that after the filing of the answer upon leave, the question of law was an open one again.

The Supreme Court of Wisconsin has decided this question in appellant's favor in a very similar case *Ellis vs. No. Pac. R. R. Co.*, 80 *Wis.* 459 (*27 Am. St.* 44), in which it was sought to plead as *res judicata*, the judgment of a Federal Court, after the State Court and the State Supreme Court had adversely decided the same question on demurrer. It was held that the question was already *res judicata* in the State Court by the decision on demurrer.

The Court said in Cocke vs. Halsey, 16 Pet. 71, 87:

"The correct legal principle applicable to such proceedings is this, That in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, its decision must be presumed proper, and is binding until it shall be regularly reversed by a superior authority; and cannot be affected, nor the rights of persons dependent upon it be impaired, by any collateral proceeding. This principle has been too long settled to admit of doubt at this day, and has been repeatedly and expressly recognized in this Court, as in the cases of Thompson vs. Tolmie and others, 2 Pet. 157; The United States Bank vs. Arrendondo, 6 Pet. 720; Voorhees vs. The Bank of the United States, 10 Pet. 473, and The Philadelphia and Trenton Railroad Company v. Stimpson, 14 Pet. 458."

See also

Wakelee vs. Davis, 44 Fed. Rep. 532.

Thompson Trials, Sec. 1061.

Oglesby vs. Attrill, 14 Fed. Rep. 214.

Beach Mod. Eq. Ptce. Secs. 275, 636.

Pennsylvania Co. vs. Platt, 47 O. St. 366.

A hearing on demurrer is a trial on issues of law and the decision is final unless further proceedings are allowed.

Alley vs. Nott, 111 U. S. 472, 475, 476.
Bissell vs. Spring Valley Twp., 124 U. S. 225.
Cutler vs. Wright, 22 N. Y. 472, 475, 478, 479.
Story Eq. Ptce., Sec. 460.
Beaumont et al. vs. Herrick, 24 O. St. 445, 457.
Price vs. Coleman, 22 Fed. Rep. 694.

And it is firmly settled that as long as the facts remain substantially the same, judgment on demurrer is *res judicata*.

Gould vs. Evansville, Etc., R. R. 91 U. S. 526, 533.
Connecticut Mutual Life Insurance Co. vs. Smith, 117 Mo. 261, 296, 297 (38 Am. St. 656).

In view of these authorities the decision on demurrer seems final between the parties, unless properly reviewed (which it was not) or unless new facts were produced other than those on which it was decided. It may be asked whether there were any new facts to give a different basis for the State decision and conclude the parties. There were not. The decision of the State Court was on the same grounds several times urged to the Federal Court as reasons why its decision on the demurrer should be for the defendants, and as often overruled by the Federal Court. It was in fact a mere opinion as to the effect of the statutes already construed by Judge Severens.

**(b) The plea should not have been received in this case, because it set up a judgment obtained in a case alleged in the bill herein to be collusive and part of the very act from which complainant sought relief (Rec. pp. 2, 8).**

Complainant offered to sustain these charges by its proofs showing the collusion, showing even that the defendant council admittedly made no defense, but was represented in court by Mr. Harris who conducted the case for the plaintiff, and moved for judgment against his own client (Rec. p. 203). It was at least the duty of the Court below to consider the evidence on this issue. See in addition to citations on page 21 of our original brief, Corbus vs. Gold Mining Co., 187 U. S. 455, last par. pp. *457*, *458*, and opinion of Court p. 465, in which Mr. Justice Brewer says:

"The district judge in his opinion, said that the facts disclosed by the record lend color to the contention that the suit was collusive. In addition to the matters pointed out by him it may also be stated that since the case was brought to this court the company has not appeared by counsel in either brief or argument."

**(c) Neither the cause of action nor the parties were the same in such sense as to make the record in the State Court an estoppel in the other courts.**

The action in the State Court was a taxpayers' action under Sec. 1777 of the Revised Statutes of Ohio. The parties in interest were the taxpayers in whose behalf such actions proceed. The relief asked was not the cancellation of the contract alleged to be illegal, nor that it be declared void; but that

the council should be enjoined from making what was alleged to be an illegal appropriation of money. The real plaintiffs were the taxpayers. The real object was the restraining of an illegal act by the council.

The Water Company, though nominally a party defendant, was not a necessary one.

City Water Supply Co. vs. City of Ottumwa, 120 Fed. Rep. 309.

The Water Company should not be held barred of its remedy by its necessary defense of such a case.

On the other hand, the case in the United States Court below was brought by the Water Company to determine its rights against the city. It had a right to its own action which it might control as it pleased, and to have its rights determined in such proper court as it chose.

Witte vs. Lockwood, 39 O. St. 141.
Brown vs. Gallaudet, 80 N. Y. 413.
De Graaf vs. Wyckoff, 118 N. Y. 1.
Washburn vs. Scutt & Co., 22 Fed. Rep. 710.

And in this United States case the city itself was the defendant, not the taxpayers who were not even proper parties and were not directly interested, and the city solicitor who represented them in the State Court had nothing to do with the suit; so that the parties were substantially different and the cause of action entirely so, but to bind the parties in a suit not on the same cause of action, they must be identical. We submit that this is especially true where the matter decided is a

pure question of law. Hence the State decision was not a bar in this case.

**II. The plea did not extend to all the issues in the case.**

It only exhibited a decision and finding of the State Court that the contract was illegal, but there were other things which the complainant had a right to have determined in its own action in the United States Court.

1st. Whether the city itself (not the taxpayers and solicitor, which question was perhaps at issue in the State Court) and the council were not estopped by ten years' performance and enjoyment of the contract from the defense that it was invalid for want of a vote at its inception. Much of the evidence which would prove that the city and council were estopped from testing the validity of the contract would not apply to the city solicitor and the taxpayers, whom he represented in the State suit, yet would entitle the complainant to a decree in the United States Court, and it was incumbent on that Court to try the case as therein made between the parties.

2d. There was the purely federal question whether the acts of the city by refusing to carry out the contract, by voting to build its own plant, by retaining the possession of the hydrants and bringing a collusive suit to enjoin itself from paying any rentals, and by the numerous other acts shown in the proofs, were not violating the complainant's rights under the constitution. The United States Court had paramount jurisdiction of this question obtained long before the State Court came to consider the case; and the city solicitor and taxpayers

were not proper parties to such a controversy. Under the Vicksburg case (185 U. S. 65) the decision of this question on demurrer in favor of the complainant was correct, and therefore it was the duty of the Court to proceed to hear the evidence and determine whether the allegations of the bill were true, and unless the evidence showed a new state of facts to which the decision on the demurrer was not applicable, to grant the complainant final decree.

3d. There was no claim set up in the State Court, or there adjudicated, of the Water Company's right to recover for water furnished and admittedly received by the city. Unquestionably this was a distinct issue not involved in the State case. There might be many reasons why an accounting and judgment must be granted against the city for the water furnished, independently of the validity of the contract between the parties, and the Court erred in disposing of the case on the decision of the State Court which only decided that question and questions which arose between the Water Company and the city solicitor and taxpayers.

Counsel for the appellees argue that the decision of the Court below on the demurrer, holding the contract valid is not correct. While we think that question is not before this Court for decision, we refer the Court to Judge Severens' opinion (Rec. p. 31 and 90 Fed. Rep. 753). The law under which it was made is as follows (83 O. L. 146):

"Section 1. Be it enacted by the General Assembly of the State of Ohio, that all cities of the fourth grade of the second class in which water works are now erected, constructed and existing, or in which they may hereafter be erected, wheth-

er such water works are owned by an incorporated company or by an individual or individuals, shall have power to contract with such company, owner or owners of such water works for supply of water for fire purposes, streets, squares and other public places within the corporate limits, and for supplying the citizens of such municipal corporation with water, or any or either of them for any term not exceeding twenty years."

Passed May 12, 1886.

The city thus having power to contract for any term not exceeding twenty years, the whole question becomes: Can the Court—in accordance with the well settled rule which gives effect to contracts and upholds vested rights whenever possible—disregard the portion of the contract in excess of the twenty year period and hold it valid for that period without doing violence to the expressed intent of the parties? Clearly it can. The contract was separable and expressly provided that in event of its termination, which might occur by purchase at the end of any five year period except the first, the unexpired portion of the term should not be considered in fixing the value (Sec. 9, Rec. p. 15). It was thus the express intent of the parties that the length of term was not part of the consideration, and to carry out the contract for twenty years and then under certain conditions to terminate it. If the parties themselves contemplated its termination at that time by the operation of its own provisions, how can it be said that its limitation to the same time by operation of law, had the effect of making it void from the beginning, even after ten years of unquestioned performance?

The whole case may be comprehended in a single ques-

tion: Must the action of the Federal Court after it had formally decided the questions involved in this case be controlled by a subsequent decision, disregarding its own, by a State intermediate court, in a case exhibited in the bill in the Federal Court and there alleged to be collusive and for the purpose of depriving the complainant of its rights under the Federal constitution, and where the parties in the two cases appear in different capacities with different rights and in a different cause of action? We think the answer to this question must be in our favor and final in this case.

Respectfully submitted,

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
Solicitors for Appellant.

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JAMES H. McKENNEY,
Clerk.

# Supreme Court of the United States.

No. 21 of October Term, 1903.
(257 of October Term, 1902).

THE DEFIANCE WATER COMPANY,
*Appellant,*

vs.

THE CITY OF DEFIANCE ET AL.,
*Appellees.*

## CITATION OF

**Defiance Water Co. vs. City of Defiance, 68 O. St., 520, and Butler vs. Eaton, 141 U. S. 240, Supplemental to Appellant's Briefs at Hearing.**

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
SOLICITORS FOR APPELLANT.

IN THE

# Supreme Court of the United States.

## OCTOBER TERM, 1903.

No. 21.

THE DEFIANCE WATER COMPANY

*vs.*

THE CITY OF DEFIANCE ET AL.

Since this cause was argued and submitted to the court, April 22d last, and since the adjournment of this court, the Supreme Court of Ohio on the 16th day of June, reversed the judgment of the Circuit Court of Defiance County, Ohio, which the defendants herein, by supplemental plea, pleaded in the court below as an adjudication *in bar* of this complainant's suit; and dismissed the suit of the city, thereby annulling the judgment of the state court. The Supreme Court of Ohio in its decision, holds directly that the right of action of the city of Defiance in the state court, was barred by the Ohio statute of limitations, at the time the suit was commenced, and, in substance, that the city was estopped from bringing the suit. We annex hereto the opinion of the Supreme Court of Ohio, printed from the proof sheets of the official report (68 O. St. 520, 48 Ohio Law Bulletin, 687), and by leave of this court cite it herein.

The decision of the state, inferior court pleaded in bar to this suit, having been annuled by the State Supreme Court, on that ground alone, if no other existed, this court, following

*Butler* v. *Eaton*, 141 U. S. 240, *243*,

should reverse the judgment of the court below.

And, as at final hearing of this suit, in the court below, the defendants relied solely on their supplemental plea, and persistently objected to the complainant's offering proof on any of the other issues, in which they were sustained by the court, having chosen to rely on their plea, rather than on the merits of their case, final decree ought now to be ordered for the complainant. Also, as we contend in our original brief, page 35, the complainant is entitled to a final decree on the bill and answer.

HENRY NEWBEGIN,
ROBERT NEWBEGIN,
*Solicitors for Appellant.*

## DEFIANCE WATER CO. *v.* DEFIANCE (CITY).

ACTION TO ENJOIN PAYMENT UNDER CONTRACT, BARRED IN TEN YEARS.

An action under Sec. 1777 Rev. Stat., to enjoin the payment of a demand arising under a contract, in which the ground for the relief sought is the invalidity *ab initio* of the contract, is barred under Sec. 4985 Rev. Stat., in ten years from the time the contract was entered into.

(June 16, 1903.)

*Error to the Circuit Court of Defiance County.*

This suit was brought on January 4, 1898, by the city solicitor of the city of Defiance in the name of the city under Sec. 1777 Rev. Stat., against the council of the city. The plaintiff seeks to enjoin the council from paying the plaintiff in error, The Defiance Water Co., the sum of $3,142.50, which it alleges is claimed by the water company from the city "for water furnished said city during the latter half of the year 1897." It is alleged that the water company claimed that said sum was due to it in accordance with the provisions of a contract entered into on August 17, 1887, between the city and S. R. Bullock & Co. to whose rights the plaintiff in error succeeded. It is alleged that the contract is illegal on the following grounds: First, that it is for the term of thirty years and not ratified by a vote of the electors of the city. Second, that no certificate had been made by the city clerk that the money required to meet the obligations arising under the contract was in the city treasury to the credit of the fund from which it was to be drawn. Without notice a temporary injunction was allowed upon this petition by the probate judge. Afterwards in the court of common pleas a general demurrer to the petition was sustained and final judgment rendered in favor of the plaintiff in error dissolving the temporary injunction and dismissing the plaintiff's petition. On appeal to the circuit court the demurrer to the petition was overruled, and after answer by the plaintiff in error and reply by the defendant in error, the suit came on for final hearing, in which the circuit court found in favor of the city and against the water

company. This proceeding in error is brought to reverse the judgment of the circuit court.

HENRY NEWBEGIN and ROBERT NEWBEGIN, for plaintiff in error.

GEORGE T. FARRELL, city solicitor, and HENRY B. HARRIS, for the defendant in error.

DAVIS, J.—There are several very interesting legal propositions propounded and defended in this case; but we think that one point in the case is decisive, rendering it unnecessary to consider any of the others If it be true that the contract between the defendant in error and Samuel R. Bullock & Co., to whose rights thereunder the plaintiff in error succeeded, was invalid for any of the reasons assigned, it is clear that a cause of action to restrain its performance accrued as soon as the parties attempted to enter into it and to act upon it, that is, upon August 17, 1887. An action for relief of the kind sought in this action is barred in ten years, Sec. 4985 Rev. Stat. This suit was begun January 4, 1898, ten years, four months and seventeen days after the cause of action accrued. Meantime the water company constructed the waterworks at great expense; and as it appears from the pleadings, the defendant in error accepted the waterworks under the alleged contract, took possession of and used hydrants as provided, and paid the water rent therefor for several years, without any question being raised as to the legality of the contract or the liability of the city. In fact, although there has been some contention over the validity of the contract since 1896, the defendant in error has used the hydrants and paid the water rents until about the time the present suit was begun. It is a stale equity, if any, which it is now sought to assert. Kellogg v. Ely, 15 Ohio St. 64. It is true that the object of this action is to restrain the payment of a demand under the contract which only accrued in 1897, and to restrain the payment of any other or further claims; but the ground for the relief sought, and the sole pretext for refusing to pay for that which the plaintiff below has had and enjoyed is the alleged invalidity of the contract which it entered into on August 17, 1887, a ground which it might have asserted and which it was its duty to assert, if at all, long before it did so in this action. There are averments in the reply of unfitness of the water supplied and of the mains, pipes and hydrants being stopped with mud; but

these can not be considered as a ground for injunction in this case because the plaintiff can only recover on the cause of action stated in the petition. *Durbin* v. *Fisk*, 16 Ohio St. 533.

The judgment of the circuit court is reversed, the demurrer to the petition is sustained and the petition is dismissed.

BURKET, C. J., SPEAR, SHAUCK and CREW, JJ., concur.
PRICE, J., not participating.